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No. 93-1784

Supreme Court, U.S.
FILED
JUN 22 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHN PATTERSON, *et al.*,

Petitioners,

—v.—

NEWSPAPER AND MAIL DELIVERERS UNION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT DAILY NEWS, L.P.'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the trial court's decision, unanimously affirmed by the Court of Appeals, to vacate the consent decree because its essential purpose had been achieved an abuse of discretion?

RULE 29.1 STATEMENT

Pursuant to Supreme Court Rule 29.1, Respondent Daily News, L.P. has no parent companies and no subsidiaries.

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JOHN PATTERSON, et al.,

Petitioners,

—v.—

NEWSPAPER AND MAIL DELIVERERS UNION, et al.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT DAILY NEWS, L.P.'S BRIEF IN OPPOSITION

Respondent Daily News, L.P. opposes the petition filed by John R. Patterson, Roland J. Broussard and Elmer Stevenson, on their own behalf and on behalf of all other persons similarly situated ("Petitioners") for a writ of *certiorari* to review the decision of the United States Court of Appeals for the Second Circuit entered in this proceeding December 20, 1993, reprinted in the appendix to the petition. (Pet. App. 1a-12a)[1]

[1] References to pages in Petitioner's appendix are designated as "Pet. App. ___." References to pages in the petition are designated as "Pet. Br. ___."

STATEMENT OF THE CASE

Petitioners seek review of a unanimous affirmance of the District Court's vacation of a consent decree based on the District Court's finding that the essential purpose of that consent decree had been achieved.

A. The Proceedings Below

A class of private plaintiffs and the Equal Employment Opportunity Commission (the "EEOC"), brought two civil rights actions in 1973 against the Newspaper and Mail Deliverers' Union of New York and Vicinity (the "NMDU" or "Union") and more than fifty publishers and news distributors having collective bargaining agreements with the Union.[2] Both lawsuits alleged that the defendants had discriminated against minorities in violation of 42 U.S.C. §§ 2000e *et seq.* ("Title VII"), and 24 U.S.C. § 1981. (JA 1-38)[3]

On September 19, 1974, then District Judge Lawrence W. Pierce issued an opinion and order approving a settlement between the parties and incorporating the Settlement Agreement in a Consent Decree. *Patterson v. NMDU*, 384 F. Supp. 585 (S.D.N.Y. 1974), *aff'd*, 514 F.2d 767 (2d Cir. 1975), *cert. denied sub nom. Larkin v. Patterson*, 427 U.S. 911 (1976). (JA 39-49) As described more fully below, the Settlement Agreement provided for an affirmative action program, the appointment of an Administrator, as well as injunctive relief. (JA 50-99) The stated "Goal" of the Settlement Agreement was the attainment of "25% minority employment in the industry." (JA 60 at ¶ 7)

In October 1974, Judge Pierce appointed William S. Ellis, Esq. as Administrator. (JA 47-49) Ellis has served as Administrator

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[2] The original 1973 actions named the New York News, Inc., the then publisher of the *Daily News* (the "News"), as a defendant. In 1991 the News was sold to Maxwell Newspapers, Inc. ("Maxwell"). In 1992, Daily News, L.P. acquired from Maxwell in bankruptcy the operating assets associated with the publication of the *Daily News*.

[3] References to "JA" are to the Joint Appendix filed below on March 12, 1993.

throughout the entire life of the Consent Decree. In February 1982 this case was reassigned to Judge William C. Conner. (JA 131)

In April 1985, a number of the defendants, including the News, moved to vacate the Consent Decree on the grounds that the 25% minority employment goal had been substantially achieved. (JA 240-43) On February 23, 1987, after a hearing to consider defendants' motion to vacate the Consent Decree, Judge Conner ruled from the bench that notwithstanding that some employers had reached or exceeded the 25% figure within their respective operations, the goal to be realized was "25% minority employment in the industry." (JA 273-76) Accordingly, the District Court deferred its decision on the motion to terminate the Decree until defendants could produce sufficient evidence to demonstrate that minority employment had reached 25% industry-wide. (JA 272-73)

In November 1988, after finding that the goal of 25% minority employment in the industry had been surpassed, the District Court suspended the affirmative action provisions of the Consent Decree that had a direct impact on the minority employment goal until the Court ruled further on defendants' motions to vacate the Decree. (JA 312-14)

On May 30, 1991, having reviewed compliance reports which indicated that the 25% goal had been met and exceeded, the District Court restored defendants' motion to vacate the Consent Decree to its calendar. (JA 541-42) On September 30, 1991, the District Court issued an opinion and order in which it deferred consideration of defendants' motion to vacate the Decree so that the concerns of plaintiffs' counsel, the NAACP Legal Defense Fund (the "LDF"), respecting the validity of the compliance reports could be addressed. *Patterson v. NMDU*, 772 F. Supp. 1439 (S.D.N.Y. 1991). (JA 580-83) In this regard, the District Court ordered the following conditions be satisfied before it would consider the pending motions: (1) that each defendant company file an affidavit with the Administrator verifying the information contained in the previously filed compliance reports; and (2) that the LDF and the EEOC take, if desired, limited discovery concerning the compliance reports; and (3) that upon plaintiffs' request, the Administrator was to conduct

an evidentiary hearing following the close of discovery to determine the validity of defendants' compliance reports.[4] (JA 583)

On July 8, 1992, the District Court issued an opinion and order vacating the Consent Decree in its entirety. *Patterson v. NMDU*, 797 F. Supp. 1174 (S.D.N.Y. 1992). (JA 690-701) On July 29, 1992 the District Court modified its July 8 order to permit the Administrator to hear and decide all claims instituted on or before July 29, 1992. (JA 709-10)

Timely Notices of Appeal were filed by private plaintiffs (JA 711-19), and by the EEOC (JA 790-95). On September 30, 1992, the District Court denied a motion by private plaintiffs to restore the Consent Decree pending appeal. *Patterson v. NMDU*, 802 F. Supp. 1053 (S.D.N.Y. 1992). (JA 796-801)

On December 20, 1993 the Court of Appeals issued an opinion unanimously affirming the District Court's opinion and order of July 8, 1992. *Patterson v. NMDU*, 13 F.3d 33 (2d Cir. 1993) (Pet. App. 1a-12a) Petitioners then filed a petition for rehearing with the Court of Appeals, which contained a suggestion that the appeal be reheard in banc. By Order dated February 7, 1994, the Court of Appeals denied that petition. (Pet. App. 13a-14a)

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[4] Pursuant to the District Court's September 30, 1991 opinion and order, on November 27, 1991, the Administrator provided the Court with a declaration under penalty of perjury, in accordance with 28 U.S.C. § 1746, from each of the defendant companies to the effect that the compliance reports consisted of and/or were based upon corporate business records. *Patterson v. NMDU*, 797 F. Supp. 1174, 1177-78 (S.D.N.Y. 1992), *aff'd*, 13 F.3d 33 (2d Cir. 1993). (JA 693-94) Neither the LDF nor the EEOC availed themselves of the opportunity to conduct discovery of the defendant companies with respect to the compliance reports. (*Id.*) In addition, neither the LDF nor the EEOC requested that the Administrator conduct an evidentiary hearing as to the validity of the reports. (*Id.*)

B. Statement of Facts

1. Background

The nature of the delivery industry is such that employers' needs for delivery department employees vary depending on the size and quantity of the publication being distributed. In general, each employer maintains a work force of Regular Situation Holders for its minimum delivery needs and supplements that work force with daily shapers. Daily shapers are divided into group hiring lists with descending hiring priorities. Shapers on the Group I list have first priority after the Regular Situation Holders, in the order of their shop seniority. The next priority belongs to shapers on the Group II list followed by Group III shapers. (JA 42)

2. The Consent Decree

At the time of the commencement of these lawsuits, minority employment in the delivery industry was less than 2%. (JA 41) The preamble to the Settlement Agreement fully acknowledges the "statistical imbalance" that existed in the delivery industry in the early 1970s. (JA 57) In resolving the then pending litigations, the parties agreed to the terms of the Settlement Agreement, the purpose of which was to remedy the "statistical imbalance" in the industry by the attainment of a 25% minority employment goal.[5] (JA 60 at ¶ 7) The 25% goal is defined as "not an inflexible quota but an objective to be achieved by the mobilization of available personnel and resources . . . in a good faith effort to maximize employment opportunities for minorities in the bargaining units in the industry represented by the NMDU." (JA 60-61 at ¶¶ 7-8)

The Consent Decree expressly recognized that defendants did not admit liability and that there had been no finding of discrimination against any person. (JA 56) The parties agreed that there was merely a statistical imbalance of minorities in the delivery departments of the defendant employers and, concomitantly, the

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[5] "Employment" is defined as the employment of individuals in Regular Situation positions or as persons on Group I lists. (JA 60 at ¶ 7)

membership of the Newspaper and Mail Deliverers' Union of New York and Vicinity ("NMDU"), which represents delivery department personnel. (JA 57) The singular purpose of the Consent Decree, by its clear and express terms, was to "correct" this statistical imbalance and "put minority individuals in the positions they would have occupied had the aforesaid statistical imbalance not existed." (JA 57)

Each of these precepts was embodied in the "Whereas" clause of the Consent Decree, which reads in full as follows:

> WHEREAS, the parties to these actions have agreed to the entry, upon this Court's approval, of a final Order adopting the provisions of this Settlement Agreement (hereinafter referred to as the "Order"), *without admission by any defendant of a violation of Title VII of the Civil Rights Act of 1964 or of 42 U.S.C. § 1981, and without any finding by this Court that any defendant has discriminated against any person or persons because of race, color or national origin*;
>
> WHEREAS, there is, and has been at all times relevant herein, a *statistical imbalance of minority individuals* (i.e., all those persons defined by the Equal Employment Opportunity Commission as Black, Spanish-surnamed, Oriental and American-Indian), employed in the delivery departments of the defendant employers within the bargaining units represented by defendant NMDU and a corresponding statistical imbalance of NMDU members;
>
> WHEREAS, the *relief provided by this Settlement Agreement is designed to correct the aforesaid statistical imbalance, to remedy and eradicate its effects, and to put minority individuals in the positions they would have occupied had the aforesaid statistical imbalance not existed.*

(JA 56-57) (emphasis supplied)

The Settlement Agreement is divided into four sections: Equitable Relief (JA 57-58 at ¶¶ 1-2), The Administrator (JA 59-60 at ¶¶ 3-6), Affirmative Action Program (JA 60-73 at ¶¶ 7-27), and General Provisions (JA 74-85 at ¶¶ 28-42).

The Equitable Relief provided for in the Consent Decree enjoined both the NMDU and the defendant employers from engaging in any act or practice which had the purpose or the effect of discriminating against any individual or class of individuals on the basis of race, color or national origin. (JA 57-58 at ¶¶ 1-2)

As the means for achieving the 25% minority employment goal, the Consent Decree established an Affirmative Action Program which set specified ratios for the employment and the advancement of minority persons. In particular, the Affirmative Action Program required that for each non-minority Group III member elevated to Group I, a minority Group III member must also be elevated. (JA 65 at ¶ 11) In addition, for every two non-minority persons added to the Group III list, three minority persons had to be added. (JA 67 at ¶ 15) Regular Situations were to be filled as they became available from the Group I list based solely on seniority.[6] (JA 64 at ¶ 10(c))

The Consent Decree also provided for the establishment of an Administrator, appointed by the District Court, "to implement the provisions of the order and . . . supervise its performance." (JA 59 at ¶ 3) The Administrator was given substantial powers, including the power to hear complaints and decide questions of interpretation of the Consent Decree, subject to judicial review by the District Court. (JA 59 at ¶ 4) The Consent Decree also required the submission of periodic reports to the Administrator by the defendants indicating progress towards compliance with the 25% goal. (JA 60 at ¶ 7) All of the Administrator's compensation and expenses are paid for by the defendants. (JA 60 at ¶ 5)

3. Attainment of The Minority Employment Goal

The parties set June 1, 1979 as the initial target date for the attainment of the 25% minority employment goal. (JA 60 at ¶ 7) In the event that the goal was not reached by June 1979, the

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[6] As stated above, in November 1988, after finding that the goal of 25% minority employment had been surpassed, the District Court suspended the 3:2 and 1:1 ratios, as well as all other affirmative action provisions of the Decree that had a direct impact on the minority employment goal. (JA 312-14)

Settlement Agreement provided for the reappointment of the Administrator by the District Court "for such time as the [District] Court may direct." (JA 60 at ¶ 6) Accordingly, the District Court extended the Administrator's term pending the attainment of the 25% goal. (JA 116-17; JA 127-30; JA 250-51)

In February 1987, the District Court, while acknowledging that certain employers have met or exceeded the 25% goal, deferred its decision on the motion to terminate the Decree until defendants could demonstrate that minority employment in the bargaining unit had reached 25% throughout the industry. (JA 272-73) On September 17, 1991, the Administrator issued a report in which he concluded that the minority employment figure industry-wide was at 27.97%. (JA 567-69)

4. The District Court Decision

On July 8, 1992, Judge Conner issued an opinion and order vacating the Consent Decree in its entirety. (JA 690-701) In reaching this decision, the District Court found that the purpose of litigation as incorporated in the Consent Decree was the attainment of the 25% minority employment goal (JA 696), and that it had the authority to vacate the Decree in its entirety upon the attainment of that goal. (JA 695-96) The District Court therefore held that "[s]ince the 25% goal has been attained, the Decree has served its purpose, and its vacation, consistent with the intent which accompanies its entry, is appropriate." (JA 699)

5. The Court of Appeals Decision

On December 20, 1993, the Court of Appeals issued an opinion unanimously affirming the District Court's opinion and order of July 8, 1992. (Pet. App. 1a-12a) The Court of Appeals agreed with the District Court that "[i]f a decree seeks pervasive change in long-established practices affecting a large number of people, and the changes are sought to vindicate significant rights of a public nature, it is appropriate to apply a flexible standard in determining when notification or termination should be ordered in light of either changed circumstances or substantial attainment of the decree's objectives." (Pet. App. 9a) The Court of Appeals therefore ruled

that the District Court applied the correct legal standard for modification of a consent decree and was entitled to vacate the entire consent decree since its essential purpose -- 25% minority representation -- had been achieved. (Pet. App. 10a)

REASONS FOR DENYING THE PETITION

The Petition does not set forth "special and important" reasons for granting the writ. *See* Sup. Ct. R. 10.1. In particular, the decision of the Second Circuit Court of Appeals has not created a split among the Circuits with respect to the proper standard a court should apply in determining whether to modify a consent decree not designed to operate in perpetuity and arising from a litigation seeking institutional reform and affecting more than just the parties thereto. Rather, the decision of the Court of Appeals to apply a flexible standard under those circumstances is entirely consistent with Supreme Court precedent and is not in conflict with the decision of another United States Court of Appeals on the same matter.

In addition, the Court of Appeals properly affirmed the trial court's vacation of the Decree upon the trial court's finding that the purpose of the Decree had been achieved. Petitioners' argument that the Decree should not have been vacated because of "evidence" of noncompliance should be rejected because it is undisputed that the Decree's goal of a 25% minority work force was achieved. In any event, Petitioners did not below, and have not here, presented "evidence" of a consistent pattern of noncompliance with respect to the Decree. The trial court was well within its discretion in rejecting Petitioners argument of noncompliance given that the court had monitored compliance with the Decree for eighteen years.

I. THE DECISION OF THE COURT BELOW IS CONSISTENT WITH SUPREME COURT PRECEDENT AND IS NOT CONTRARY TO THE DECISION OF ANY OTHER COURT OF APPEALS

A. The Court Below Correctly *Read U.S. v. Swift & Co.* As Limited To Its Facts

In arguing that the Court should grant its petition for a writ of certiorari, Petitioners state that "[t]he basis for the decision below was that the standard established for modifying or dissolving consent decrees established by *U.S. v. Swift & Co.*, 286 U.S. 106

(1932), has effectively been superseded by this Court's decisions in *Dowell* and *Rufo*." (Pet. Br. at 19) Petitioners misread the Court of Appeals' decision. The Second Circuit stated only that the caselaw "suggest[s] that *Swift* is a special case that should not be read as setting down a general standard for all future cases." (Pet. App. 8a) Thus, the Court of Appeals did not hold that *Swift* had been overruled by *Dowell* or *Rufo*, but was merely following the Court's precedent that *Swift* should be read as limited to its facts.

The Second Circuit was correct in reading *Swift* in this manner. This Court has stated that "*Swift* teaches that a decree may be changed upon an appropriate showing," and that the specific standard applied in *Swift*, i.e., "nothing less than a clear showing of grievous wrong evoked by new and unforseen conditions should lead us to change,"[7] "must . . . be read in light of [its] context." *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968). The Court in *United Shoe Machinery Corp.* interpreted *Swift* as holding that the defendants must show grievous wrong only when the purpose of the decree has not been achieved or when a danger of reversion to the conditions which necessitated the decree still exist. 391 U.S. at 248. In contrast, where the purpose of the decree has been achieved and such a danger does not exist, such a showing is not required. *Board of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 247 (1991).

Later decisions of this Court have also recognized that the intent of the Court in *Swift* was not to make "grievous harm" the appropriate showing in every case involving a motion to modify a consent decree.[8] Rather, the language of *Swift* "must be read in the context of the continuing danger of unlawful restraints on trade which the Court had found still existed." *Dowell*, 498 U.S. at 247;

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[7] The fact that the consent decree in *Swift* by its terms was meant to operate in perpetuity, 286 U.S. at 116, and that the defendants had not complied in good faith with the decree (*id.*), contributed to the Court's finding that the appropriate showing was "grievous harm."

[8] *See Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 758 (1992) ("[T]he 'grievous wrong' language of *Swift* was not intended to take on a talismanic quality, warding off virtually all efforts to modify consent decrees.")

United Shoe Machinery Corp., 391 U.S. at 248. "There is . . . little basis for concluding that Rule 60(b) misread the *Swift* opinion and intended that modifications of consent decrees in all cases were to be governed by the standard actually applied in *Swift*. That Rule, in providing that . . . a party may be relieved from a final judgment or decree where it is no longer equitable that the judgment have prospective application, permits a less stringent, more flexible standard." *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 758 (1992).

Swift does not provide the proper standard for modification of consent decrees that "are not intended to operate in perpetuity." *Dowell*, 498 U.S. at 248. Rather, the "District Court should address itself to whether the [defendant] had complied in good faith with the . . . decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable." *Dowell*, 498 U.S. at 249-50.

The restraints imposed by the consent decree in the instant case, unlike those at issue in *Swift*, were never intended to operate in perpetuity. *See* JA 695. In addition, the decree in the instant action, unlike *Swift*, does not concern a commercial litigation but rather an institutional reform litigation that "sought to vindicate significant rights of a public nature." (Pet. App. 9a) Thus, the trial court below did not abuse its discretion by applying the flexible standard in determining whether to modify the decree and the Court of Appeals properly affirmed the trial court's use of that standard.

B. The Decision Below Is Not In Conflict With The Decision Of Any Other United States Court Of Appeals On The Same Matter

Petitioners' argument that their writ of certiorari should be granted because "there is conflict between the circuits" "regarding the standard that should govern the dissolution of consent decrees" (Pet. Br. at 19) should be rejected because there is no such conflict between the circuits. Petitioners fail to cite to any decision of another United States Court of Appeals holding that a trial court may not use the flexible standard in an institutional reform litigation

between private litigants where the consent decree is not meant to operate in perpetuity. *See* Sup. Ct. R. 10.1(a).

Petitioners cite to four decisions in support of its assertion that "it is apparent that there is both conflict and uncertainty as to whether *Dowell* and *Rufo* overruled *Swift & Co.*" (Pet. Br. at 19) None of those decisions, however, hold that *Swift* was so overruled. Nor do any of them apply the rigorous standard for modifying a consent decree applied in *Swift* to a non-commercial case involving equitable principles and reform litigation.

In *In re Hendrix*, 986 F.2d 195 (7th Cir. 1993), the Seventh Circuit did not hold "that *Swift & Co.* was completely overruled by *Rufo*," (Pet. Br. at 19), but merely stated that although *Rufo* "involved institutional reform litigation, the 'flexible standard' . . . is no less suitable to other types of equitable case." 986 F.2d at 198. Further, the Court of Appeals' decision in *In re Hendrix* is perfectly consistent with the Court of Appeals' decision below in that it applied the flexible standard to a lawsuit involving private litigants.

Petitioners also cite to a Sixth Circuit decision, *Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2998 (1993), and to an Eighth Circuit decision, *Epp v. Kerrey*, 964 F.2d 754 (8th Cir. 1992), for the proposition that "the Sixth and Eighth Circuits have only applied *Rufo* to cases involving governmental entities." (Pet. Br. at 19) The decisions cited by Petitioners, however, do not involve private parties in a reform litigation (as does the instant litigation), but rather merely follow *Rufo* by applying the flexible standard for modifying decrees in institutional reform litigations where the government is a party. Thus, they do *not* hold that the *Rufo* standard may not be applied in cases involving only private entities and therefore are not contrary to the Second Circuit's decision.

Finally, Petitioners, citing to *W.L. Gore & Assocs., Inc. v. C.R. Bard, Inc.*, 977 F.2d 558 (Fed. Cir. 1992), state that "the Federal Circuit has declined to apply the *Rufo* standard to commercial litigation involving a private defendant." (Pet. Br. at 19) This holding is perfectly consistent with Supreme Court

precedent and the decision below that *Swift* is still viable, but limited to its factual circumstances. The Federal Circuit in *W.L. Gore* declined to apply the flexible standard because "commercial decrees affect only the parties to the particular suit, whereas institutional cases may impose action, or restrain action, in ways that transcend the persons involved in the suit and its settlement." *W.L. Gore*, 977 F.2d at 562. That holding is consistent with the holding below because the consent decree in the instant action was not designed to vindicate a public interest in eradicating vestiges of alleged discriminatory hiring. (Pet. App. 9a)

Thus, Petitioners fail to cite to any Court of Appeals decision holding that in a reform litigation involving only private litigants, the proper standard for determining a motion to modify or vacate a consent decree is the one set forth in *Swift*. Petitioners are also incorrect in arguing that the decision below held that *Swift* has been overruled. Hence, Petitioners have not shown any conflict between the decision below and the decision of any other Court of Appeals regarding the proper standard to be applied to a motion to modify or vacate a consent decree.

II. THE COURTS BELOW DID REQUIRE COMPLIANCE WITH THE CONSENT DECREE

A. The Courts Below Found That The Purpose of The Decree Had Been Achieved

The district court's power to vacate or modify a consent decree is subject to a finding by the court that "the purposes of the litigation as incorporated in the decree . . . have . . . been fully achieved." *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968). *See also Board of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 247 (1991). In addition, the court must also consider whether there is a danger that the conditions which the parties sought to correct by entering the decree will resume if the decree is dissolved. *Dowell*, 498 U.S. at 247 ; *United States v. Swift & Co.*, 286 U.S. 106, 117 (1932).

Applying this standard, the District Court properly vacated the Consent Decree in its entirety after finding that the defendants had complied with their obligations under the Decree, the purpose of which -- 25% minority employment -- had been achieved. (JA 696). The District Court also found that the concerns which warranted the adoption of the Decree in 1974 no longer exist, and are not likely to reemerge. (*Id.* at n.10) The Court of Appeals correctly deferred to the discretion of the District Court with respect to these factual findings (Pet. App. 12a), as the District Court had monitored the Decree for eighteen years and thus was in the best position to determine whether defendants had substantially complied with the Decree.

In addition to the fact that the situation compelling the entry of the Consent Decree -- less than 2% minority employment -- has been eradicated, the District Court found that there was a foundation in place which suggested that minority representation would continue to increase notwithstanding vacation of the Decree. (JA 696 n.10) This increase would be the result "of the 'carryover' effect resulting from concentrations of minorities in lower seniority positions . . . coupled with increased voluntary attrition of more senior non-minority NMDU personnel." *Id.*

Petitioners mislead the Court in arguing that "it was clear error for the District Court to hold that whether the Defendants had continued to violate the Consent Decree was irrelevant to whether the decree should be dissolved" (Pet. Br. at 21), because the District Court made no such holding. Rather, in rejecting Plaintiff's request for a full evidentiary hearing on whether, *inter alia*, the industry had committed violations of the decree, the Court stated as follows:

> Such a hearing . . . is neither required nor necessary. In the instant case, *the Administrator, as well as the Court, has monitored compliance with the Settlement Agreement since its inception*. With respect to the instant motion to vacate or terminate the Consent Decree, the parties have presented extensive arguments to this Court in various motion papers, at a conference held on May 30, 1991, and at a hearing held on February 23, 1987. *There is, accordingly, a vast evidentiary foundation -- both statistical and experiential -- which this Court may explore in order to decide whether vacation of the Decree is appropriate*.

(JA 698) (emphasis added)

The Court thereafter merely stated in *dicta* that "[e]ven assuming, *arguendo*, the LDF's proposition that defendants have continued to violate the Consent Decree and that discrimination remains prevalent in the industry, such arguments are not relevant to defendants' application for vacation of the Consent Decree." (*Id.*) Contrary to Petitioners' presentation, the District Court obviously made this statement in dicta to underscore its view based upon a "vast evidentiary foundation" that a hearing on petitioner's allegations was "neither required nor necessary." (*Id.*)

B. Petitioners Have Not Shown Evidence Of A Consistent Pattern of Violations Of The Decree

Petitioners argue that vacation of the Decree was improper because "plaintiffs presented substantial evidence that there had been a consistent pattern of violations of the decree" (Pet. Br. at 14), which demonstrates "bad faith" by Respondents (Pet. Br. at 21). This argument must be rejected, first and foremost, because the purpose of the Decree was *not* the transformation of defendants into a discrimination-free industry. The purpose of the anti-discrimination provisions of the Decree, like the implementation ratios, was to facilitate achievement of the 25% goal.

Petitioners' argument must also be rejected because there is no evidence that discrimination is pervasive within the industry. The District Court specifically rejected Petitioners' allegation that discrimination is rampant, noting that both the Court and the Administrator had monitored compliance with the Consent Decree since its inception and had thereby acquired "a vast evidentiary foundation" that informed their respective judgments. (JA 698) Against this backdrop, the District Court's acceptance of the Administrator's conclusion that the industry was in substantial compliance with the Consent Decree, 1991 Report at 9 (JA 564), warrants considerable deference.

Petitioners' blanket assertions that they have "presented substantial evidence that there has been a consistent pattern of violations of the decree" (Pet. Br. at 14), and that "the district court itself had held on a number of occasions *after* the motions to dissolve the injunction had been filed, that both the Union and various of the other defendants had violated the decree, and, indeed, had committed acts of intentional discrimination" (Pet. Br. at 20), are disingenuous and false. In support of these assertions, Petitioners cite to only four "examples" of such "evidence" (Pet. Br. at 14), and in none of those did the District Court make a finding of intentional discrimination.

With respect to Petitioners' first example (*id.*), the claim at issue concerned the Union's assertion that the affirmative action program in the Decree should be terminated as to the News because

minority employees at the News had at that time (1987) already constituted more than 25% of the work force. (Pet. App. 74a) The District Court rejected this argument because it found that the Decree "established a goal of 25% minority employment in the bargaining unit throughout the entire industry." (*Id.*) The Court therefore "refused to lift the decree as to individual employers even though they may have achieved the 25% goal." (*Id.*) This is thus not an example of a finding of intentional discrimination or of bad faith by Respondents.

With respect to Petitioners' second example (Pet. Br. at 14-15), the claim involves The New York Times and the NMDU and arose at a time when employment of minorities at The Times delivery department exceeded the 25% target; the remainder of the industry was nearing the 25% target; and this Court had issued its decision in *Firefighters Local No. 1784 v. Stotts*, 467 U.S. 561 (1984) just one year earlier and the spate of subsequent affirmative action decisions of this Court that confined *Stotts* had not yet issued. There was considerable uncertainty regarding the parties' legal rights since Respondents' motions to vacate or modify the Consent Decree were pending before the District Court and undecided (JA 336-58, 498, 261, 273-76). Petitioners misstate the facts in asserting that one-half of 47 regular situation positions were filled by minority members only as a result of the Administrator's orders. In fact, the District Court stayed (and effectively nullified) an Order of the Administrator that would have compelled such a result upon the motion of The New York Times. Petitioners should have noted that the claim is ongoing and may be appealed to the Second Circuit upon conclusion of its remedy proceeding. (JA 595-600)

With respect to Petitioners' third and fourth examples, Petitioners admit that they were findings of discrimination by the Administrator, which were settled between the parties *before* review by the District Court. (Pet. Br. at 15) Moreover, these findings involved only three employees out of a total over one thousand of employees covered by the Decree.

Finally, Petitioners also cite to an offer of proof submitted to the Court containing affidavits and declarations of 29 minority employees. This, of course, is not evidence of violations but

merely *allegations* of violations. Further, in view of the District Court's unambiguous directive that all complaints be referred to the Administrator, the only proper way for Petitioners to attempt to demonstrate that discrimination remained pervasive was to present these allegations to the Administrator. In any event, as the District Court stated, "the Decree nowhere states that it should remain in effect until each and every claim of discrimination is resolved." (Pet. App. 131a)

Thus, Petitioners' assertions that there is "evidence" of a consistent pattern of violations of the Decree and that the District Court made findings of intentional discrimination are not supported by the record evidence nor is there any evidence of industry-wide discrimination.[9] At most, Petitioners have presented evidence that the Administrator, before review by the District Court, made findings of discrimination as to the three employees which findings were ultimately settled.

III. THE DECISION OF THE COURT BELOW WILL NOT UNDERMINE THE SETTLEMENT OF CASES IN FEDERAL COURT

Petitioners' argument that "the decision below will substantially discourage plaintiffs from settling complex employment discriminations and other civil rights litigation" (Pet. Br. at 22) should be rejected because the exact opposite would result were the decision vacated on the grounds proffered. For the District Court to have refused to vacate the Decree, after its purpose had been accomplished, and thus require defendants to nevertheless continue to be bound by its extremely costly provisions, would surely discourage future defendants from entering into such decrees. As recognized by the Court of Appeals in its decision below: "For

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[9] Petitioners also disingenuously state that while "in 1987 Judge Conner found the evidence insufficient to establish that the industry as a whole had met the 25% goal," "in 1988 he suspended the 3/2 ratio for placing workers on the Group III list." (Pet. Br. at 16) Petitioners neglect to point out, however, that in the 1988 Order suspending the 3/2 ratio Judge Conner stated that "the percentage of minority employment is 27.61%." (JA 313)

Defendants . . . it is the prospect of modification as circumstances change or objectives are substantially reached that provides the incentive to settle on reasonable terms, rather than adamantly resist in protracted litigation." (Pet. App. 10a) Petitioners in effect seek to modify the Decree by having it remain in effect, notwithstanding the undisputed fact that the expressed goal of 25% minority employment had been met, until there is an end to allegations of discrimination in the industry. That was not the intent of the parties when the Decree was entered. To allow Petitioners to rewrite the Decree to change its expressed goal would be a blow to the certainty for which parties to a settlement certainly bargain. The District Court, with full knowledge of the history of the Decree, did not abuse its discretion in vacating the Decree after industry-wide attainment of 25% minority employment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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